

**IN THE SUPREME COURT OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 76/2011

SC/ HCCA/LA/ 182/2010

EP/HCCA/KAL/151/2008

DC Kalmunai No/1168/L

Ahamed Lebbe Hadjiar Athambawa,  
(Deceased)

1. Mohamed Ismail Alim Suhaihaumma,  
2. Athambawa Sulha Beebe,  
Both of Division 5,  
Sainthamaruthu.

Substituted Plaintiff

**Vs.**

1. Athamlebbe Mohamed Yusuf,  
2. Seenimohamed Jemilunnisa,  
Both of Division 3,  
Nintavur.

Defendants

**AND**

1. Mohamed Ismail Alim Suhaihaumma,  
2. Athambawa Sulha Beebe,  
Both of Division 5,  
Sainthamaruthu.

Substituted Plaintiff Appellant

**Vs.**

1. Athamlebbe Mohamed Yusuf,
2. Seenimohamed Jemilunnisa,  
Both of Division 3,  
Nintavur.

Defendant Respondents

**AND NOW BETWEEN**

1. Athamlebbe Mohamed Yusuf,
2. Seenimohamed Jemilunnisa,  
Both of Division 3,  
Nintavur.

Defendant Respondent Appellants

**Vs.**

1. Mohamed Ismail Alim Suhaihaumma,
2. Athambawa Sulha Beebe,  
Both of Division 5,  
Sainthamaruthu.

Substituted Plaintiff Appellant Respondents

BEFORE : K. SRIPAVAN, CJ.

WANASUNDERA, PC, J.

UPALY ABEYRATHNE, J.

COUNSEL : A. R. Surendran PC with V. Puvitharan, N.  
Kandeepan and M. Jude Dinesh for the  
Defendant Respondent Appellants

Nizan Kariapper with Wasantha  
 Wanigasekera, M.C.M. Nawas, M.I.M.  
 Iynullah, Ms. Sanfara and Ms. Irfiya for the  
 substituted Plaintiff Appellant Respondents

WRITTEN SUBMISSION ON: 29.02.2016 (Defendant Respondent  
 Appellants)

29.02.2016 (Plaintiff Appellant  
 Respondents)

ARGUED ON : 05.02.2016

DECIDED ON : 09.06.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Eastern Province holden at Kalmunai dated 06.05.2010. By the said judgment the High Court of Civil Appeal has set aside the judgment of the learned District Judge of Kalmunai dated 09.10.2002 and allowed the appeal of the substituted Plaintiff Appellant Respondents (hereinafter referred to as the Respondents) with costs. Being aggrieved by the said judgment of the High Court of Civil Appeal the Defendant Respondent Appellants (hereinafter referred to as the Appellants) sought leave to appeal to this Court and leave was granted on the questions of law set out in paragraph 23 (V), (VII) and (XIV) of the Petition of Appeal dated 16.06.2010. Said questions of law are as follows;

(V) Were the learned High Court Judges erred in failing to appreciate that the substituted Plaintiff had failed to discharge

the burden of establishing the market value of the land at the time of the sale by calling a person competent to give valuation of the land to give the market value of the said land and that therefore he was disentitled in law to rely on the ground of '*leasio enormis*'?

(VII) Have the learned High Court Judges misdirected themselves in coming to the conclusion that the sale is liable to be cancelled on the basis of '*leasio enormis*' without considering the fact that there was absolutely no evidence showing that the original Plaintiff who sold the land to the Defendants did not know the market value of the said land at the time of the sale?

(XIV) Did the learned Judges of the High Court err in law in as much as even on the basis of their conclusion that there was '*leasio enormis*' (which is not conceded) they ought to have given the defendants their lawful right of election and the option of paying the deference between the alleged value of the land and the price paid by the Defendants?

The original Plaintiff in his amended plaint dated 28<sup>th</sup> of September 1979 averred that by virtue of deed of transfer bearing No. 11945 dated 11.09.1971 he became the owner of the land described in the schedule to the plaint. On or about 02.12.1975, he borrowed from the 1<sup>st</sup> Defendant a sum of Rs 18,000/- and granted a usufructuary mortgage of the said land to the 1<sup>st</sup> Defendant by deed bearing No 26257 dated 02.12.1975 and in pursuance of the said usufructuary mortgage the 1<sup>st</sup> Defendant entered in to the possession of the said land. Thereafter the original Plaintiff burrowed from the 1<sup>st</sup> Defendant a further sum of Rs. 4,000/-

and executed a deed of transfer bearing No 26903 dated 12.09.1976 transferring the said land to the 2<sup>nd</sup> Defendant who was the wife of the 1<sup>st</sup> Defendant. In this regard the Plaintiff took up the position that he did not intend to dispose of the beneficial interest of the said land to the Defendants by the said deed of transfer No 26903 and at the time of execution of the said deed of transfer No 26903 the Defendants agreed to re-convey the said land to the Plaintiff upon the repayment of said sum of money borrowed on said two deeds. He further averred that on or about 15<sup>th</sup> of March 1978 he offered the said sum of money to the Defendants but the Defendants in breach of the agreement refused to accept the money and to discharge the mortgage bond and to retransfer the said land to the Plaintiff. Accordingly the Plaintiff sought a declaration that the said property is held by the Defendants in trust to the benefit of the Plaintiff and in the alternative sought relief under the doctrine of '*leasio enormis*' on the basis that at the time of execution of the said deed of transfer No 26903 said property was worth Rs. 60,000/- and the price at which he sold the property is less than half its true value.

The Appellants, in their amended answer dated 28<sup>th</sup> May 1980, took up the position that the actual value of the land prevailing at the time of sale was paid to the Respondents.

The case proceeded to trial on 19 issues. The Respondents have raised issues on the basis that the Appellants must hold the property in question for the benefit of the Respondents and also on the basis that the Appellants secretly intended to defraud the Respondents at the time of the execution of deed bearing No 26903 and acted in collusion and *malafide* obtained a transfer at an undervalue and at a price grossly disproportionate to its true value.

Even though at the hearing of the appeal before this court the learned Counsel for the Appellants submitted that as reflected in paragraph 04 of their written submission the only question to be dealt with by this court is that ‘whether the Respondents are entitled to set aside the sale of the land in dispute to the Appellants on the basis of *laesio enormis*?’

Upon the said question of law, the learned counsel for the Appellants submitted that the Respondents have failed to prove that the land in question was sold for less than half of its true value. It is well settled law that the burden is on the person who claims the benefit of the doctrine of *laesio enormis* to prove the true value of the thing in question at the time of sale. This may be done by expert evidence or by proving the market value at the time and place of sale. (Article 336 of The Law of contracts by C.G. Weeramantry at page 330 – First Indian Reprint - 1999 – Published by Kailash Balani for Lawman (India) Private Limited)

In the case of *Goonaratne Vs Don Philip* (1899) 5 NLR 268, It was held that “in order to succeed in an action for rescission of sale on the ground of *Enormis Laesio*: plaintiff must prove that the property was at the date of the sale worth double the price the defendant paid for it.”

Therefore the Respondents, in order to claim the benefit of the doctrine of *laesio enormis*, must prove the true value of the land in question at the time of the sale and it was sold less than half of its true value.

I now consider whether the Respondents were able to discharge the said burden on balance of probability.

At the trial before the District Court the Plaintiff Respondents had closed their case leading the evidence of the Assistant Commissioner of Agrarian

Services Ahamadlebbe Ibrralebbe, witness Abubucker Meerasaibu and the 1<sup>st</sup> substituted Plaintiff Mohamed Ismail Alim Suhaihaumma reading the documents marked P 1 and P 2. P 1 was the mortgage bond bearing No 26257 dated 02.12.1975 and P 2 was the deed of transfer bearing No 26903 dated 03.09.1977.

The Appellants had closed their case leading the evidence of the 1<sup>st</sup> Defendant Respondent Appellant Atham Lebbe Mohammed Yuoosuf, witness Umarlebbe Wathoor, Divisional Officer, Agrarian Services Department, witness Murukuppan Thawarajah, clerk, Land Registry, witness Velu Umapathi, Registrar of Land Kalmunai, witness Abdul Hameed Abdul Wahab, Grama Niladari. Nintavur and witness Mohamed Thamby Sehu Ismail, reading the documents marked D 1 to D 4. The Appellants had produced several deeds of transfer marked D 1 to D 4 in order to establish the market value of the land in dispute prevailing at the time of the execution of the deed in question.

Both parties admitted that the original Plaintiff had become the owner of the land in dispute by virtue of the deed of transfer bearing No 11945 dated 11.09.1971 and also the original Plaintiff borrowed from the 1<sup>st</sup> Defendant a sum of Rs 18,000/- on 02.12.1975 upon a usufructuary mortgage bond bearing No 26257 dated 02.12.1975.

According to the evidence of the 1<sup>st</sup> substituted Plaintiff Appellant Respondent after the execution of the said mortgage bond, her husband, the original owner had borrowed from the 1<sup>st</sup> Defendant a further sum of Rs 4000/- upon the execution of the deed of transfer bearing No 26903 dated 03.09.1977 (P 2). It is important to note that in her evidence at page 110 of the brief she categorically said “I do not know what the price of this land was in 1975 and 1976”.

Witness Abubucker Meerasaibu too was an ordinary person who had no knowledge or experience in valuing lands. The only witness who had been called to give evidence with regard to the true value of the land in dispute at the time of sale was Ahamadlebbe Ibrralebbe, the Assistant Commissioner of Agrarian Services. In his evidence he said that his previous position was the Divisional Officer for Nintavur and his functions were implementation of the Agrarian Services Law No 58 of 1979, attending to irrigation and cultivation disputes, convening committee meetings and attending to divisional agricultural development activities etc. He said that he was not functioning as a Valuer of Lands. He further said that he did not know the particular field but he knew 'kandam' in which that was situated. His evidence was not based upon a valuation report which had been prepared by him after an inspection of the land in dispute.

The Respondents did not call any other witnesses to prove the true value of the land in dispute at the time of sale or to corroborate the evidence of the Assistant Commissioner of Agrarian Services. Assistant Commissioner himself had admitted that he was not an expert on the valuation of lands. In the said premise the Assistant Commissioner's unsupported evidence of the true value of the land in dispute should not have been accepted, as there was no evidence that he was specially skilled in regard to the valuation of land, and it had not been established that, as an Valuer, he was an "expert" within the meaning of section 45 of the Evidence Ordinance. Furthermore, his evidence at page 88 of the brief clearly reflects that his valuation was a mere assertion, and there was no explanation as to how it was arrived at - whether by reference to comparable sales, or any of the other recognized methods of valuing lands. His valuation of the land in dispute, with its many defects, at a round figure of Rs. 10 to 12 thousand per acre in 1975, without any explanation, was clearly arbitrary and capricious.

With regard to the Assistant Commissioner's evidence, learned Counsel for the Respondent submitted that the learned High Court Judges have sufficiently dealt with the Assistant Commissioner's qualifications as an expert and had reach to the conclusion that it had been sufficiently established.

The learned High Court Judges, in order to justify their conclusion which was solely based upon the evidence of the Assistant Commissioner of Agrarian Services, have cited a selected portion of the dictum in *Gunasekera Vs Amarasekera* [1993] 1 SLR 170 which reads thus "It is for the judge to determine whether the witness had undergone such a course of study or experience as will render him expert in a particular subject, and it is not necessary for the expertise to have been acquired professionally". No doubt that the Judge who hears the case should determine whether a particular witness had undergone such a course of study or experience as will render him expert in a particular subject. But in doing so a Judge should consider the evidence adduced at the trial to establish the proficiency in the relevant field in order to form a decision that the particular witness had undergone such a course of study or experience as will render him expert in a particular subject.

It seems that the learned High Court Judges had not paid their attention to the facts and circumstances of the case of *Gunasekera Vs Amarasekera* (supra) and to the final determination of the Supreme Court. In this case the defendant's surveyor who was the only witness testified for the case of the Defendant, said that he was a licensed surveyor, as well as a Court Commissioner of many Courts; and that he had five years' experience in "surveying land and valuing buildings". In evidence-in-chief he said nothing whatever about any special skill, qualification or experience in valuing land. As for the property in suit, he said it was a 50 to 60 year old house, 2,300 sq. ft. in area, built of brick, with a tiled

roof and cement floors, and jak timber frames; being of solid construction, despite damage caused by vandals and through neglect, he valued the house (as at January 1979) at Rs. 100,000. The land he valued at the rate of Rs. 15,000 per perch, i.e. Rs. 525,000. The property was thus worth Rs. 625,000 in his opinion. He did not give any explanation as to how he arrived at these figures. The Supreme Court held that the defendant has failed to prove that the true value of the property in suit was more than double the consideration shown on the face of the deed. It is manifest that the Supreme Court had not relied upon the sole evidence of the surveyor in deciding the true value of the subject matter.

On the other hand, in *Ponnupillai Vs Kumaravetpillai* (1963) 65 NLR 241, 248 where the Privy Council had acted upon the evidence of a surveyor in determining the value of land in order to apply the doctrine of *laesio enormis*. In that case there were several witnesses in regard to value, the surveyor having been also the Chairman of the local authority; further, there is nothing to suggest that the necessary evidence to qualify him as an expert had not been led.

Cross, Evidence (6th ed., p. 442) observes: "It is for the Judge to determine whether the witness had undergone such a course of special study or experience as will render him expert in a particular subject and it is not necessary for the expertise to have been acquired professionally".

Similarly, Coomaraswamy, Evidence (2nd ed., vol. 1, p. 624) observes "Any person who, from his circumstances and employment, possesses special means of knowledge, has given the subject particular attention, and is more than ordinarily conversant with its details, will be considered 'specially skilled' for the purposes of this section".

For the forgoing reasons I hold that the Respondents have failed to prove the true value of the land in dispute at the time of the sale. Hence I set aside the judgment of the High Court of Civil Appeal of the Eastern Province holden at Kalmunai dated 06.05.2010 and affirm the judgment of the learned District Judge dated 09.10.2002. I allow the appeal of the Appellants with costs.

*Appeal allowed.*

Judge of the Supreme Court

K. Sripavan, CJ.

I agree.

Judge of the Supreme Court

Wanasundera, PC, J.

I agree.

Judge of the Supreme Court